

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
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(240) 777-6600

Case No. A-6633

PETITION OF NINA AND EMIL ASHFORD

OPINION OF THE BOARD

(Hearing Date: October 23, 2019)

(Effective Date of Opinion: October 31, 2019)

Case No. A-6633 is an application by Nina and Emil Ashford for a variance of four (4) feet for an existing structure which is within sixteen (16) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance. The need for the variance arises due to the proposed construction of an addition which, while it will conform with the applicable rear, side and front yard setbacks, necessitates relief for the original house from the rear yard setback.

The Board of Appeals held a hearing on the application on October 23, 2019. Petitioner Emil Ashford appeared at the hearing in support of the petition, represented by Soo Lee-Cho, Esquire. The Petitioners' architect, Ronald Johnston, also appeared and testified.

Decision of the Board: Requested Variance **GRANTED**.

EVIDENCE PRESENTED

1. The subject property is Lot 12, Block 1, Indian Spring Park Subdivision, located at 301 E. Franklin Avenue, Silver Spring, Maryland, 20901, in the R-60 Zone. It is located at the corner of E. Franklin Avenue and Garwood Street, was platted in 1927, and is 7,066 square feet in size. See Exhibits 3 and 4.
2. Per the Statement of Justification ("Statement"), the subject property is improved with a one-story, single family dwelling, built in the 1950's, with an above-grade area of

881 square feet. The Petitioners purchased this house in May of this year. See Exhibit 3. Regarding the orientation and use of the existing house, the Statement states:

Historical use of the property has been such that the northern side of the property has served as the property's functional rear yard, with the location of a wooden deck and porch on that side of the house, while the eastern side has served as an open side yard facing E. Franklin Avenue. This historical orientation and use of the property will not change as a result of Applicant's proposed improvements but will be reinforced. The Applicants are proposing to remove/demolish the existing wooden deck/porch structures such that an unobstructed rear yard measuring 16 feet from the existing northern wall of the house to the northern boundary line will be provided. This, however, will still leave them 4 feet short of the 20 feet required for the rear yard setback but only to the extent of the siting of the existing house. The proposed addition has been designed to fully comply with the 20-foot minimum rear setback required by the applicable 1928 Ordinance.

The proposed addition will be located on the eastern side of the existing house, in the "side yard" described above. See Exhibit 4.

3. The Statement asserts that the requested variance satisfies Section 59-7.3.2.E.2.a.v of the Zoning Ordinance because the proposed development substantially conforms with the established historic or traditional development pattern of the neighborhood, as follows:

The historical orientation/use of the property as it relates to its neighboring properties has been such that the northern side of the property has served as the property's functional rear yard. This historical orientation and use of the property will not change as a result of Applicants' proposed improvements or by the granting of the requested variance, but will in fact be reinforced.

See Exhibit 3. The Statement goes on to note that the special circumstances pertaining to this property are not the result of any actions by the Petitioners, since the historical orientation of the house is unchanged since its construction in the 1950s, and since the Petitioners only purchased the property this year. It notes that the variance requested is the minimum necessary in that it "simply seek[s] to bring the existing house's setbacks into conformance with zoning requirements." Finally, the Statement notes that the grant of this variance will not impair the intent and integrity of the 1996 Four Corners Master Plan, and will not be adverse to the use and enjoyment of abutting or confronting properties because "what is being proposed does not change the historical orientation/use, i.e., the functional location of the rear yard, of the Subject Property." See Exhibit 3.

4. At the hearing, Ms. Lee-Cho oriented the Board to the property and to the variance requested, which she stated is for the existing home, noting that the proposed addition will comply with all required setbacks. She stated that the County's Department of

Permitting Services ("DPS") has indicated that a building permit cannot be issued for the proposed construction without the grant of a variance for the existing home. She stated that the grant of the variance will allow for conformity with the existing development pattern.

In response to a Board question, Ms. Lee-Cho stated that this property was platted before any zoning was in place. She stated that because this is a corner property, the Petitioners can choose which lot line is the side lot line and which is the rear, and noted that the rear lot line is typically located on the side of the side street, consistent with the Petitioners' proposal. In response to further Board questioning asking if an addition could be built without getting a variance for the existing house, Ms. Lee-Cho stated that the functional rear of the house is non-conforming for a rear lot line, that the area of the property that was selected for the addition is the only area available, and that if the variance for the existing house is not granted, the addition would not be possible.

5. Petitioner Emil Ashford testified that he has owned the subject property with his wife since early summer. He testified that prior to purchasing the property, they had engaged the services of an architect to develop plans for the proposed addition and had informally consulted with DPS to ensure that they would be able to build the addition they were contemplating. He testified that the existing house, at 881 square feet, is too small to meet his family's needs, and that they purchased this property only after investing significant time and money to ensure that the existing house could be expanded to meet those needs. Mr. Ashford testified that it was not until after they had purchased the house that they learned of the need for a variance. He testified that the cost of the home, of hiring an architect, and now of an attorney were all hardships, and that if they do not get the variance and cannot construct the proposed addition, they will have to sell the home to cut their losses.

Mr. Ashford testified that the front door of the existing house faces E. Franklin Avenue, that the home is addressed and has a mailbox on E. Franklin Avenue, and that there is a path from E. Franklin Avenue to the front door. He testified that the property has a large grassy area to the east, and a smaller grassy area to the west. He testified that the back door leads to the property's functional rear, and that the existing deck will be removed so that the 16 feet behind the house is clear of structures. He testified that this area has historically been considered the property's "rear" yard, and that they intend to continue that use. He noted that the house on the abutting property to the east also faces on E. Franklin Avenue, and that in addition to maintaining the historical orientation of his own house, the proposed addition has an orientation consistent with that of the neighboring house. Mr. Ashford testified that granting the requested variance for the existing house is the minimum needed to obtain compliance with the Zoning Ordinance, and that it will not impair the intent and integrity of the Master Plan, which he stated reaffirms the current R-60 zoning. He also testified that he is not aware that his neighbors have any concerns, and accordingly that granting the proposed variance will not be adverse to the use and enjoyment of abutting or confronting property owners.

In response to a Board question, Mr. Ashford testified that they would not be touching any of the large trees on the property, but that some of the smaller trees would be removed and relocated to the other side of the property.

6. Architect Ronald Johnston, who designed the proposed addition to this house, testified in response to Board questioning that the architectural plans for the addition were drawn up before the decision was made to remove the deck and porch/stoop, and thus do not reflect the demolition of those items. He testified that those aspects of the existing house will be demolished, as shown on the current site plan. See Exhibit 4. He further testified that the proposed addition is fully compliant with required setbacks.

FINDINGS OF THE BOARD

Based on the binding testimony of the Petitioner and his architect, and the evidence of record, the Board finds that the variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E as follows:

1. *Section 59-7.3.2.E.2.a - one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59.7.3.2.E.2.a.ii the proposed development uses an existing legal nonconforming property or structure;

The Board finds that the existing house does not conform to the required rear lot line setback and is therefore nonconforming. The Board further finds that the Petitioner is proposing to construct an addition to the existing house. Thus the Board finds that the proposed development uses an existing legal nonconforming structure, and satisfies this element of the variance test. See Exhibits 3 and 4.

Section 59.7.3.2.E.2.a.v the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Board further finds, based on the testimony of the Petitioner and the Statement in the record at Exhibit 3, that the existing house on the subject property, for which the variance is sought in connection with the proposed construction, has been in its current location since the 1950s, with its functional front on E. Franklin Avenue, similar to that of the abutting property. Thus the Board finds that the grant of this variance, which would preserve this orientation, would substantially conform with the established historic or traditional development pattern of this street or neighborhood.

2. *Section 59-7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the Petitioners purchased the subject property this year, and therefore are not responsible for the location of the existing home, which was constructed in the 1950s, relative to the property lines, or for its orientation relative to the street.

3. *Section 59-7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds, based on the representation of counsel and the Statement in the record at Exhibit 3, that without the grant of the requested variance for the existing house, the proposed construction of a compliant addition cannot move forward. Thus the Board finds that the variance requested for the existing house is the minimum needed to overcome the practical difficulties that full compliance with the Zoning Ordinance would otherwise impose.

4. *Section 59-7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*

The Board finds that the requested variance will allow the continued residential use of this property, and thus can be granted without substantial impairment to the intent and integrity of the 1996 Four Corners Master Plan.

5. *Section 59-7.3.2.E.2.e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

In light of the testimony of the Petitioner that he is not aware of any neighbor concerns, and based on the Statement in the record at Exhibit 3, the Board finds that granting the requested variance for the existing house will not adversely affect the use and enjoyment of abutting or confronting properties because it will not change the historical orientation of the house or the functional location of its rear yard. In addition, the Board notes, based on the testimony of record, that the Petitioners are seeking to preserve existing trees, which will help to mitigate any impact on neighboring properties.

Accordingly, the requested variance for the existing structure is **granted**, subject to the following condition:

1. Petitioners shall be bound by the testimony and exhibits of record, to the extent that such testimony and evidence are mentioned in this opinion.

Therefore, based upon the foregoing, on a motion by Katherine Freeman, seconded by John H. Pentecost, Chair, with Jon W. Cook and Mary Gonzales in agreement, and with Bruce Goldensohn, Vice Chair, necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 31st day of October, 2019.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.